REVIEWS

THE CONTRACT CLAUSE OF THE CONSTITUTION. By Benjamin Fletcher Wright, Jr. Cambridge: Harvard University Press, 1938. Pp. xvii, 287. $3.50.

PROFESSOR WRIGHT has given us a book which will satisfy neither the conservatives nor the radicals among constitutional scholars. Several reviewers have already accused him of a bias against the Supreme Court, and at least one has dismissed his book as failing to go beyond legalistic tradition. That he has produced a useful book no one can deny. Among the great constitutional doctrines, that of the immunity of the obligation of contracts from impairment by state laws has never had an adequate historian. Wright has been through the cases, sifted some five hundred, classified them and studied their sequential relation. He prefaces this by a detailed study of the probable intentions of the constitutional framers; he has some valid if unoriginal things to say about Marshall's role in the creation of the judicial doctrine, and some more original if perhaps less valid things to say about Taney's role. He has brought to his task patience, a capacity for detail, and a fresh critical intelligence that is not content to accept any tradition of scholarship without re-examination.

But whatever importance the book has lies beyond the confines of such craftsmanship. If Wright had merely meant to produce one of those tomes that professors turn out to appease their consciences and their presidents, I should have ended this review at the first paragraph and spent the time thus saved on one of Agatha Christie's latest mystery thrillers. Wright has, by his own avowals, aimed at something beyond the genealogy of legalisms. His introduction is a prospectus full of exciting anticipations. He speaks of the "extraordinary importance" of the clause "in the growth of American industrial society;" he points out that "the period of its vigor is that of the growth of the corporate form of industrial organization;" he mentions the "major role" it has played "in our economic as well as our constitutional history;" he promises the portrayal of "the role of the Supreme Court as a governing body in American life;" and he locates his study "somewhere on the undefinable and overlapping borders of constitutional and economic history."

Introductions are almost always unfortunate: an author puts into them what he fears the book itself has failed to make clear; they are generally the graveyards of unrealized hopes. To an extent this is true of Wright's book. I say "to an extent." If there were an SEC to pass judgment on scholarly prospectuses, I should defend this one on the ground that the achievement of the book itself was enough to get it inside the ropes of legality. And as part of my proof I should point to some of the reviews. Professor Dowling, writing in the *Harvard Law Review,* is slightly saddened when Wright goes beyond the cases into economics; and his sadness is linked with a suspicion that in leaving the trim walks of case law Wright means to show up Marshall and the Court. Professor Crosskey, writing in the *Journal of Political Econ-*

omy, is more than saddened when Wright starts ahead of the cases with the intentions of the constitutional framers and thus ventures into the history of ideas. He spends almost the whole of a longish review subjecting this part of Wright's scholarship to a raking cross-fire, and arguing that the drafting committee intended the clause to be broad and not limited. He accuses Wright of being "misled by certain preconceptions as to the sort of Constitution that the Fathers gave us," and then reveals his own when he invokes despairingly among us all "some faint, incipient tremors of suspicion, that, perhaps, possibly, after all, the Fathers may have intended us to be a nation." Evidently Wright, to the extent that he has ventured into the area of the economic context of the decisions and into the area of the history of constitutional ideas, has drawn blood.

But the problem remains of how effective he has been in these areas beyond irritating the stricter traditionalists. As a study in the history of ideas, the book lacks the historical imagination that might have sent the author off the beaten track in quest of the roots, both social and ideological, of the decisions and their actual consequences. It lacks richness of texture, that sense at once of the complexity of American institutional history and of the cleaving social logic which can hack a path through that complexity. One might place this book beside a study such as Walton Hamilton has done of the history of the maxim of *caveat emptor,* or of the doctrine of industry affected with a public interest or of due process, and bring out the difference between a competent job and a significant essay in the history of ideas. This is not to deny some real insights that Mr. Wright has given us. Despite Professor Crosskey's strictures, I find Wright's version of the origin of the contract clause the more persuasive of the two. Wright is also justified in opposing the usual view that the Taney court reversed the Marshall interpretation of the contract clause. But in opposing this view, Wright finds himself carried too far in the opposite direction; and one gets a picture, which is not a true one, of Taney's economic philosophy as almost indistinguishable from that of Marshall. After Taney, the book ceases to be doctrinal history and becomes an analytical dissection of the court's views on various phases of the contract clause.

Something of the same criticism can be made when one views the book as a study in the relation between law and economics. I suspect that when Wright speaks of his study as "somewhere on the undefinable and overlapping borders of constitutional and economic history" he carries over the implied sense of vagueness and imprecision into his work itself. It is not enough, as Professor Mark Howe has pointed out in a review of the book,[1] for a constitutional scholar today to speak of breaking through the traditional boundaries separating lawyers from other social scientists. The sense of emancipation and of the breaking of barriers is a pervasive one today. The question is always whether a new illumination is achieved in the process. It would take an enormous amount of research to do a significant piece of work of this sort in the vast field covered by the contract clause. The work of research has yet to be done on most of the Justices whom Professor Wright discusses and on most of the leading decisions. Any one who has had the experience of digging into the thought of even a single Justice in detail, or

1. N. Y. Herald-Tribune Books, Nov. 27, 1939, p. 22.

the economic context and consequences of even a single decision, will know how treacherous and difficult the task is. On the whole, I have the impression that Mr. Wright has not in either the Marshall or the Taney chapters dug up very much that is new. He missed, for example, in his discussion of *Fletcher v. Peck* perhaps the most revealing treatment of the economics and sociology of the case, written by Forrest R. Morgan in an obscure magazine, *Americana*. And, moving away from the problem of detailed research, he has failed to give us the sweep of economic history which would enable us to give perspective to the economic meaning of the sequence of contract decisions.

If I have been exacting in my analysis of the book's shortcomings, it is because I have used as criteria the high intentions that the author has himself expressed. Judged by the more usual criteria of clarity, cogency, craftsmanship, the book deserves high praise. But if progress is to be made in constitutional study, Mr. Wright is justified in aiming at more than he attains. He has posed the problem of an economic-legal study of the contract clause even when he has not resolved it. The students who come after him will have to be more articulate and more precise in the very area in which Mr. Wright is vague — that of economic motivations and consequences and of the idea systems based upon them. They will set themselves the task of inquiring into the interest groups involved in each important case, the economic stakes, the psychological tensions in which the decisions were made, the pull of class interest and the pull of intellectual tradition, the economic imperatives which forced the decisions to march in the direction they did, and the area of choice that was left even within the framework of these imperatives. This is a difficult task, and one far easier to map out, in a grand manner, than to apply in the detailed analysis of a specific doctrine like the contract clause. But unless doctrinal studies are made with imagination and concreteness along the lines not only of legal but also of economic analysis, we shall never be much wiser than we are about the relations between judicial review and American capitalism.

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TECHNOLOGY OF LABOR. A Study of the Human Problems of Labor Saving. By Elliott Dunlap Smith and Richmond Carter Nyman. New Haven: Yale University Press, 1939. Pp. xiv, 222. $2.50.

FOR many years Professor Elliott Dunlap Smith and his able collaborator, Mr. Richmond C. Nyman, have been painstakingly collecting and analyzing a mass of data on the "stretch-out" in textiles. In their slim volume, they have made available a summary of their conclusions; but little indication is given of the magnitude of the task involved. Except for a brief description on the jacket of the methods employed in the survey and a relatively infre-

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quent use of illustrative examples in the text, a careless reader might almost assume that the authors had reached their conclusions by pure speculation.

To the extent that there are grounds for this impression, it is doubly unfortunate. First, it makes the book somewhat less readable than it would have been if the author had permitted himself more space for illustrative evidence. There is a tendency toward abstraction which is not always easy to follow. Second, the central conclusions are such that they might easily be accepted on *a priori* grounds without supporting evidence by any liberal and intelligent employer, labor leader, or student of industrial relations. What seems to me important is not so much the conclusions as the fact that they are supported by a mountain of evidence. A missionary in the field of industrial relations does not need the conclusions — they are likely to be the assumptions upon which his daily sermons rest. What the missionary wants is the statistics, the stories, the case studies, the methodology in which his hypotheses may be factually grounded. Professor Smith has been over-modest in telling the industrial world how much work he and Mr. Nyman have done.

This is the worst that I can say about *Technology and Labor*. I have probably overstated the case since for a few years I was privileged to watch the compilation of "stretch-out" case studies and the intricate methods by which they were analyzed. Most readers will probably not feel, therefore, the sense of bereavement which I experience over the continued interment of so many useful facts and figures in the filing cabinets of the Institute of Human Relations.

Professor Smith's central conclusion is that in the introduction of technological change there is a large area of identity of interest between management[1] and labor. Management and labor may gain or lose together depending upon the manner in which the technological change is introduced. In many of the cases studied, management, in pursuit of greater profit or in an effort to avoid further losses, attempted to introduce changes without adequately consulting the interests of labor. The results were disastrous both to management and labor. In other cases, management was scrupulously considerate of the effect of the change upon workers. The results were beneficial to management and to those workers who remained employed after the change. There is no implied conclusion here that management and labor gain or lose *equally* from technological advance. Neither does it follow that no workers will suffer as a result of the change. Nor, finally, can it be concluded that there is no diversity of interest between the two groups. But it can be emphatically stated that they have in common a far larger area of interest than was apparently realized by a significantly large group of managements among those studied.

Stated thus, there is nothing startling about this conclusion. But Professor Smith is able to show in detail the manner in which some managements, by disregarding this truism, failed disastrously while others, by attending to employee-interests, succeeded. One set of workers' interests lies in avoiding the physical or mental strain which may result from technological change. Another lies in avoiding possible unemployment. A third lies in winning

1. The term "management" is here used to include "ownership" although there may, of course, be a great deal of difference between the two.

some share of the gain for themselves in the form either of increased earnings or of shorter hours. The question which Professor Smith is setting himself is this: "To what extent is management interested in these same objectives?" He raises the question in detail in connection with the avoidance of physical or mental strain. He applies it briefly to the matter of unemployment. And he raises it only by indirection in the case of wages and hours.

The answer to the question, "Should management, in pursuit of its own interests, avoid overstraining its employees?" is flat and conclusive. It should. If it does not, the results will be spoiled goods, conscious or unconscious sabotage, high labor turn-over, strikes, the destruction of community morale, red ink on the annual report and bankruptcy — any or all. Professor Smith makes it clear that it is as useless to "blame" labor for behaving in this manner as it would be to blame water for boiling at 212 degrees Fahrenheit at sea level. The facts are that textile labor in large masses over a considerable period of time, usually without leadership and often without apparent conscious design, has behaved in just this way. From a cold-blooded profit-making point of view, any management which persists in overlooking this is determined to commit financial hara-kiri. Mr. Smith puts it much more dispassionately, but the moral is hard to miss.

How does a manager avoid imposing physical and mental over-strain upon his employees? The answer is as intricate as a blue-print for a submarine. It involves improvement in raw materials, changes in the routing of the productive process, careful planning of the time, extent and tempo of the change, patience, tact, deliberation and intelligence, consideration of the influence of habit, customs, personalities, prevailing attitudes, pride, prestige, and so on. This is not a catalog. It's a few samples of the factors involved. I read this section of Professor Smith's book with an awed respect for the managers who correctly handled these factors and for the two social scientists who tabulated and analyzed them.

On the question of unemployment, Professor Smith's book is not so satisfactory. It is not intended to be. He concedes that technological change may result in unemployment within the industry or in industrial society as a whole. He does not defend the classical thesis of automatic reëmployment through the price mechanism. He does make a valid point, however, of the fact that many difficulties may be avoided through eliminating jobs no more rapidly than the working force can be reduced by stopping the employment of new workers and allowing the normal quit-rate to continue. In this way the psychological consequences of positive disemployment can be avoided — and these are serious to workers, management and the community. Moreover, it imposes gradualism upon management and increases the probabilities of reabsorption of workers negatively displaced. And it practically compels management to introduce the change during good times, when quit-rates are relatively high and the opportunities for quick reabsorption relatively great.

Although Professor Smith has many illuminating comments to make upon the question of wages and hours, he intentionally sidesteps the basic issue as to the extent of the identity of employer-labor interests in these matters. He is content to accept the general level of wages and hours as being set by the broad controls of competition or government regulation — controls

over which the individual management has scant influence. By direct comment and by implication, however, he makes it clear that "mental strain" is a very broad category. If management wants to make money it must handle the whole wages and hours question in such a way as not to set up either physical or psychological strains which will in the short or long run be expensive. Mr. Smith makes some detailed and practical suggestions.

Relatively unrelated to the main thesis are many of Mr. Smith's most interesting observations: labor extension paves the way for industrial unionism. The new techniques of management increase the necessity for a clear medium of two-way communication between management and workers. The prerequisites for successful management are so severe and technical that they increasingly require formal training. The ladder of industrial ascension leads to the schools rather than through the plant. Human relations in industry form a fabric so delicate that infinite pains are required to avoid its rupture. Honesty in industrial relations is not only the best policy, it's the only policy. This last may be hard to believe. It's a little threadbare. But if faith needs refurbishing with facts, read *Technology and Labor*. If you still don't believe it, persuade Mr. Nyman to let you see those case studies and those beautiful charts — all in color, as I remember them.

Professor Smith has written about an industry which, at the time of the research, was almost completely non-union. In such an industry, his book is directed primarily toward management. It is management which must be sold the idea of worker-employer identity of interest. Upon management rests the responsibility for doing the job. As the textile industry and others of equal importance approach complete unionization, however, the responsibility will shift toward the labor leader who must share it with management. Where organized labor is not merely fighting for status, but actually enjoys power, this book is required reading. I could wish, for example, that in the current Chrysler dispute the leaders of both sets of interests would take a day off and read *Technology and Labor*. It goes almost without saying that to the student of contemporary industrial relations the book is indispensable.

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THE LAW AND MR. SMITH. By Max Radin. Indianapolis and New York: The Bobbs-Merrill Co., 1938. Pp. 333.

THE Smith addressed by Professor Radin is an individual of somewhat varying age and intelligence. In Chapter One and some other places he is obviously Master Smith, to whom very simple stories are told to show him the beginnings and present-day operations of law. At some places he is presumably more of a scholar than the Smith Brothers we know. At many other places, he is apparently assumed to be no better posted on the data of com-

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parative jurisprudence and legal theory than most of the somewhat intellectually interested Smiths we meet (or are) at ordinary alumni gatherings and faculty meetings.

What will this Mr. Smith get out of Professor Radin's book? Not much help in the practical utilization of the law. He is not told how to draw a will, make a lease or take care of himself in court. Indeed, an apparent aim of Professor Radin is to increase rather than decrease Smith's sense of dependence upon legal experts. He patiently explains how and why rules of law — as distinguished from rules of religion, morality, custom or fashion — first appeared among primitive men; how and why the task of saying what these rules are became gradually the task of particular individuals, supported by the organized power of the community; how these public officials find out what the rules are and why we must employ specially trained private persons either to guess what the officials are going to find the rules of law to be or else to persuade them to find what we want them to find. Lawyers, we are finally convinced in the next to last chapter (entitled "Lawyers Should Be Abolished"), should not be abolished. In the course of this demonstration, the author considers how far judges are able to admit notions of what is just and good into what they say the law is; why they follow no precise and constant course in this; what are the common, or nearly common, elements in the legal systems of different places and times; at what stages and in what ways procedure becomes predominant in the life of the law; and how we get particular elements in the substance and method of our laws of tort, contracts, property and crime. Professor Radin sets this forth vividly, with a variety of historical and anthropological illustrations. He has written a highly interesting and useful book.

Yet the Smith now speaking has two complaints. One is against Professor Radin's prevailing assumption that he removes our frequent wonder and dismay over the behavior of our judges and lawyers, by effectively showing us how inevitable are most of the demands these persons undertake to meet and how naturally and gradually they have fallen into some of their characteristic ways of serving those demands. But on the one hand, we have not often doubted that judges and lawyers are needed; and, on the other hand, even after reading this book we shall probably continue to wonder why our public and private legal guides delay, mislead and confuse us so much in their work of applying law to the settlement of issues affecting our private and public interests. As to the law and public policy (and Smith not only has some public-spirited interest in legal decisions on public policy but also recognizes that the manner of reaching such decisions often affects his private interest) Professor Radin has almost nothing to say. He throws no light on the question of judicial versus legislative or administrative discretion; "the law" that he explains to Smith leaves out administrative law and due process of law. Thus, generally, Professor Radin fails to supply much information or reassurance on one of Smith's major worries about the law — that a government of laws gives us so troublesome and uncertain a government of men.

The other complaint is that, in his effort to enlighten us by striking comparisons and contrasts, Professor Radin seems (at a very few places) needlessly to overstate his case. Thus in the introductory pages of the chapter

on "Crime and Punishment," he makes a discrimination, with considerable emphasis and repetition, between early and late communities with respect to their dealings with conflicts between private individuals—John inflicting bodily injury on Jehu, Robinson trespassing on Smith's lands, Jones snatching Brown's purse (to use Professor Radin's examples). The notion that the community should concern itself with such acts is, the author says, "relatively late in arising"; in early communities, "if one individual injured another, that was a matter between them." As for our Anglo-American legal tradition, Professor Radin partly supplies his own correction for such sweeping statements; for he shows that among the ancient and medieval mid-European peoples from whom we derive much of our criminal law, the same act might be both a private injury for which the wrong-doer had to pay compensation to the injured person, and a violation of "the peace," for which he was punished directly by public authorities. He might have added that the early Germanic codes contained elaborate rules, defined and enforced by public authorities, regulating the "private" compensation to be paid for the "private" wrong. Moreover, he might also have said that in some primitive groups, property disputes and acts of assault, trespass, and theft are dealt with directly by the community or by those exercising authority for the community. Indeed the writings of anthropologists suggest to Smith that among many primitive peoples the ordinary native lives very much in the public eye, and the community officially concerns itself with the most neighborly squabbles and maraudings of John and Jehu.

These are minor complaints against a learned, brilliantly written, slightly soothing explanation of some important matters of the law.

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FEDERAL ADMINISTRATORS. By Arthur W. Macmahon and John D. Millett. New York: Columbia University Press, 1939. Pp. XIV, 524. $4.50.

THIS pioneering book presents, for probably the first time, an over-all picture of the intricate structure of the Federal Government in terms of the men who make it work. Biographical sketches are dovetailed with the complex organization and functioning of the federal departments. Men who are the heroes of the press and the columnists are mentioned, but the primary emphasis is on the larger group of unsung men who are the life-blood of the Government. Here one finds more said about William H. McReynolds and Ebert K. Burlew than about Henry Morgenthau, Jr., and Harold L. Ickes.

The Government of these United States is coming of age when the shroud of anonymity is dropped from the McReynolds' and they become heroes between covers. Anonymity has its uses for career personnel who serve across changing administrations. At the present stage of the development of the

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career service too much public fame in one administration might well result to the disadvantage of a career servant upon a change in administration.

But publicity and fame for career servants also has its uses. By concentrating on the personalities of some of our leading career men, in the light of the work they do, the authors lead us to face and partially solve one of the basic problems confronting the Government.

With the rapid expansion of the Government's activities in many new fields and the increasing complexity of the tasks to be done, the problem of getting superior personnel is a crucial one. The depression, the contracting opportunities in private life, greater security of public positions, and a growing realization of the nature and importance of the problems of Government have already started to bring many men into the Government who might otherwise not have gone into it. By dramatizing those who have come to the top in an emerging career service, this book will strengthen the forces already at work for attracting some of the "best brains" of the country to such a service. It doubtless will do a good deal more for the service than the host of books about the more general and abstract features of the civil service. Its example probably will and should be the forerunner of other personalized books on career men—particularly those younger men who are now in the levels below the top grades.

Some of the awareness of the problems and opportunities in Government which this book gives may be of particular interest to lawyers and lawyers-to-be. The number of younger lawyers who took comparatively minor posts and then came back in important non-career positions with the Government is far higher than a chance distribution. Roswell Magill, Arthur A. Ballantine, John Bassett Moore and Thomas D. Thacher are only a few of the lawyers who returned to important positions. Perhaps their earlier experiences gave them an interest in and an awareness of Government that had something to do with their return. As the authors also point out, roughly about two-thirds of the career men who are now bureau chiefs have been in the professional service. This is a natural trend. In actual life, law and administration are closely interrelated. Hardly an administrative problem exists that does not present some legal question. At least the many lawyers, who are now administrators in the career service of the Government, are better able to spot the many legal problems involved in administration.

The chances are that if the lawyers are covered into the competitive classified civil service more and more lawyers will turn administrators. Transferring from one branch of the competitive service to another is a more likely occurrence than the transfer from an exempt to a civil service. For those lawyers who have a knack for administration, the opportunities may be even greater in the administrative service than in the legal service. It happens, at the present time, that the lawyers on the whole have better training and are likely to have wider experience in dealing with administrative problems than even the administrators in comparable grades. But the administrators, particularly in the top levels, have greater power and as interesting—if not more interesting—work than the lawyers in the same level. It may well be, therefore, that lawyers in a career service in the Government, who have an aptitude for administration, would in reality have two avenues open to them.

Although the main task of most of the lawyers as well as the administrators in the Government is supposedly to execute and administer policy, they do in fact participate, in varying degrees, in its formulation. Unfortunately, this presents a problem which the authors do not face head on. The problem is how to get the continuous services of superior personnel and at the same time to have a Government that is responsive to the changing needs of a democracy. Continuous and trained administrative competence is indispensable, even in a period of change, because of the complexity of the Government mechanism. One has but to compare the functioning of the N.R.A. with some of the newer activities of the Treasury to see that an able and enlightened conservatism as to the administrative feasibility of certain proposals may be something quite different from bureaucratic obstructionism. Personal relationships between career men in different departments also aid greatly in getting things done—be they old or new things.

But given a permanent staff of legal and administrative experts with bents that are different than the prevailing views of a majority of the public, the permanent staff can effectively influence the policy of a department despite the different views of the ordinary non-career cabinet member or general counsel. Government in this country today is so complex and far-flung that it is impossible for non-experts temporarily in the cabinet or other policy-making positions to make independent studies and reach independent judgments on the great bulk of questions which arise from day to day. To a large extent, reliance is and necessarily must be placed on the experts on the staff. Ordinarily the influence of such experts is along the beaten track. New ideas are seldom given a ready reception by a bureaucracy. Gladstone stated this phase of the problem when he said that he could not remember a single administrative reform which the experts did not oppose when he first proposed it. Only in those rare cases where the cabinet member, general counsel or other policy-making official is well trained in the highly specialized character of the work in his department, a prodigious worker or an unusual administrator, can he successfully control the views and behavior of his career service personnel.

As Thomas Huxley put it some sixty years ago, the apparent question on this score is "whether shifting corruption is better than permanent bureaucracy." Those, however, are only the poles of opposites. Conceivably a compromise can be made between them by eliminating most of the disadvantages of shifting corruption and obtaining most of the advantages of a permanent bureaucracy of experts. Resistance to change is probably in part a function of intelligence and economic standing. If a career service is made up of people with a high order of intelligence and drawn from the poor and those of moderate means as well as the rich, part of the evils of a permanent bureaucracy may well be minimized. Also, if capable elected or appointed non-expert officials in the top jobs direct and utilize the services of an adaptable permanent career service made up of trained experts, we may reach an effective compromise. Although the authors do not directly point up this problem, their book may well help in a solution of it by attracting the kind of competence that is necessary to work out this compromise.

Read in the particular light of the doings of the President's Committee on Civil Service Improvement—the so-called Reed Committee—this book pre-

sents several new slants on the careers for lawyers *qua* lawyers in the Government Service. At the present time the Federal Government is the world's largest client. There are now approximately 5,400 legal positions in the federal service. Of this number only about 930 are now in the competitive classified civil service. The rest are still in the class exempted from the competitive civil service. The exempted class can be covered into the competitive civil service either by presidential executive order or by statute. If most or all of the lawyers, with the exception of presidential appointees, or those in policy-making positions, are recommended for covering in by the Reed Committee, then we shall probably have a permanent career service for most of the Government's lawyers. With this possibility of a career service for lawyers in the Government both as lawyers and alternately as administrators, it should behoove lawyers and potential lawyers, who are interested, to get some informed knowledge about the present trends in the Federal Government service. This book will give it to them.

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CASES ON MORTGAGES. Second Edition. By Morton C. Campbell. St. Paul: West Publishing Co., 1939. Pp. xxii, 794.

THIS is a second edition of the *Cases on Mortgages of Real Property* by Professor Morton C. Campbell of Harvard Law School. It is intended to provide material for a course of thirty-two lectures. The editor states in the preface that it has been his practice to select certain chapters for treatment in a particular year, varying from year to year. Recent developments in the law of mortgages furnish the justification for the second edition, namely, the cases of the last few years relating to mortgages for future advances, mortgages of income, seizure of income of real estate through receiverships, and cases dealing with the competition between mortgages of real estate and liens on chattels annexed or attached thereto. A number of late cases dealing mainly with these subjects have been inserted.

Of the desirability of the case method of study there remains little doubt. The cases furnish the background for critical comparative discussion both with regard to the decisions reached by the courts and the basic principles of substantive law involved. Thereby the students are trained in sound reading and legal analysis, while, at the same time, they acquire an acquaintance with the actual decisions of the courts.

When Dr. Josef Redlich of the University of Vienna investigated and studied, in 1913, the case method of law teaching on behalf of the Carnegie Foundation, he wrote as follows:

> "As the method was developed, it laid the main emphasis upon precisely that aspect of the training which the older text-book school entirely neglected: the training of the student in intellectual independence, in indi-

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> vidual thinking, in digging out the principles through penetrating analysis of the material found within separate cases: material which contains, all mixed in with one another, both the facts, as life creates them, which generate the law, and at the same time rules of the law itself, component parts of the general system. In the fact that . . . it has actually accomplished this purpose, lies the great success of the case method. For it really teaches the pupil to think in the way that any practical lawyer — whether dealing with written or with unwritten law, ought to and has to think."

Of recent years there has been some criticism of the case method technique, chiefly by those who are not thoroughly grounded in the fundamental principles on which the system rests. The suggestion, for example, has been advanced that attempts have been made to compel it to do more than reasonably can be expected. It has also been suggested that the too constant study of cases gives a distorted perspective on the objects and purposes of law. In the writer's opinion, after twenty-eight years of continuous law teaching, the case method is the most effective and practical device for teaching law, provided the cases are handled in the manner in which they should be.

Professor Campbell's book contains a number of interesting innovations, particularly the use of a great number of hypothetical questions. For example: most case books contain a considerable number of cases dealing with the important topic of Future Advances. Professor Campbell's book contains one case on this topic, *Ackerman v. Hunsicker*.[1] Then, following this case, appear five hypothetical questions with references to a number of authorities which shed light on the problems contained in these hypothetical questions. If the student really is to study these questions, he must read the cases to which reference is made. A serious doubt suggests itself at once whether the library facilities of our law schools are adequate for this purpose. For instance, reference is made to a case in the California Appellate Court Reports, which is also reported in the Pacific 2d, unofficial. If a class contains one hundred or more students, it may be difficult, if not quite impossible, for the student to secure access to the case in the reports. Therefore, to the writer, it would seem advisable to include more cases in the text, even though, perhaps, fewer topics may be covered.

In some instances, the abbreviation of cases by Professor Campbell seems over-accentuated. For instance: *Mooney v. Byrne*,[2] covers about a dozen pages in the New York Court of Appeals Reports. It is recognized as a leading case and is an outstanding instance of fine opinion writing by the late Judge Vann. Professor Campbell cuts the case down to two pages. The question at once suggests itself whether such abbreviation is not too extreme. In Professor Kirchwey's collection, nine pages were devoted to this case, particularly because of the outstanding discussion of the maxim, "Once a mortgage, always a mortgage," which is omitted in Professor Campbell's collection.

It is also highly debatable whether the editor is justified in giving seventy-seven pages of the book to reprinting a form of corporate mortgage.

The cases are well chosen, and there can be no doubt that the student can acquire a thorough knowledge of the law of mortgages of real estate from

1. 85 N. Y. 43 (1881), quoted at 498.
2. 163 N. Y. 86 (1900).

this collection, but it is obvious that the collection differs radically from the classic type of Harvard Law School case book as originated by Langdell in 1871, and as so well developed later by Ames, Keener and Gray. It was these men who actually determined the form and type of case book which has been used so widely and effectively for so many years in our American law schools. Whether the novelties and innovations which are recently being injected in the teaching of law furnish a sound norm for legal instruction only the future can disclose.

The practical efficiency of Professor Campbell's collection is greatly enhanced by a collection of articles relating to the subject of mortgages, a complete table of cases, both in the text and footnotes, and a detailed index referring to pages of text, footnotes and to problems.

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TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN, 1805–1824. Ann Arbor, Mich., University of Michigan Press. 1925, 1938, 4 vols. Pp. liv, 632; 515; xliii, 755; 621. $30.00.

THIS series aims to make available to students the law reports and other legal records of Michigan prior to the first regular published reports of 1843 and the chancery cases of 1836. In its first four volumes, the series has advanced down to the year 1824. Volume One contains the first journal of the Supreme Court of the Territory of Michigan, 1805–1814, including a number of opinions, admissions to the bar, naturalization proceedings, court rules, grand jury proceedings, etc. The second volume comprises selected papers from the file of the court, Judge Witherell's docket, and a calendar of miscellaneous papers. This calendar is continued down to 1825 in the third volume which also contains the reports, 1819–1820, of James Duane Doty, clerk of court, and republishes the notes of trials, arguments, and decisions, 1822–1823, which had appeared in the contemporary Detroit Gazette. The fourth volume, including the chancery journal, 1819–1825, a digest and table of court rules, and other miscellaneous tables brings the journal of the court to 1825. It is perhaps significant that prefacing each account of a case which appeared in the Gazette was a quotation from *King Lear:*

> "A man may see how this world goes with no eyes. Look with thine ears; see how yon Justice rails upon yon simple thief. Hark in thine ear—change places; and handy-dandy, which is the Justice which the Thief?"

The regularity with which this quotation is repeated in the columns of that paper would seem to indicate that some of the inhabitants of Michigan Territory still held a pretty low opinion of the judiciary. Assuredly, the conduct

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of the courts in early territorial times was hardly conducive to creating favorable public opinion.[1]

Apart from matters of jurisdiction and court procedure, the published text offers much illumination on the subject of the reception of the English common law and the sources of legislation for Michigan Territory. As regards the first, these volumes evidence a large-scale reception of English law. An act of 1795 declaring the common law of England and certain British statutes to be in force was patterned after a Virginia statute of 1776, which that state had, as a matter of fact, repealed in 1792. Great deference to the common law is evidenced in these four volumes. For example, to support the view that a judge might act in a criminal case although he may have been injured by the defendant's conduct, nine English authorities were cited (II, 339). The common law is authority for the issuance of writs of mandamus (I, 504), and throughout pleadings are construed in close observance of common law models. In holding that an arrest on Sunday on a civil process was illegal (III, 431), Judge Woodward followed the view according to which the writings of the Church fathers and the Church constitutions were binding insofar as they determined principles of ecclesiastical law applicable in England. Woodward's intensive research in theological history testified to a tacit accord with the doctrine held in some seaboard states, establishing Christianity and the canon law as part of the common law which had been transplanted to the American colonies.

It is significant that in Ohio, another state formed out of the Northwest Territory, this doctrine was categorically rejected.[2] It is not unlikely, however, that, since the defendant in the case before Woodward was the Earl of Selkirk, charged with the seizure of a Michigan resident, the jurist sought to rationalize a judgment in which diplomatic considerations were determining. Such considerations were still uppermost, as sources of friction in this area had not been eliminated with the termination of the Second War with Britain. British constitutional and statutory privileges were also resorted to by Judge Sibley in seeking an answer to the query: "How far a member of Congress may claim Privilege from Arrest." In the case in question, one Richard, a Catholic priest elected delegate to Congress in 1823, was confined to debtor's prison in between sessions of Congress and was required to post bond that he would keep within prison limits. This he breached in order to attend a session of Congress. But the court denied the privilege claimed in this case on grounds set forth in 2 Strange 989 that the writ of privilege was unusual, "not issued without strong reasons and then with great care and much circumspection" (III, 119).

1. For the general breakdown of territorial government in the first decade of the 19th century, see the illuminating account by Francis S. Philbrick, *Laws of the Indiana Territory, 1801–1809* (1930) 31 ILL. HIST. COLL.

2. The Ohio ruling was based on an interpretation of a provision of the state constitution guaranteeing religious liberty and prohibiting preferential treatment to any church—phraseology identical with the constitution of Pennsylvania, in which state a contrary ruling was upheld. Compare Bloom v. Richards, 2 Ohio 387 (n.s.) (1853) with Zeissweiss v. James, 63 Pa. 465 (1870).

Any inference that there was a servile imitation of common law at all times would be grossly unfair, however. Thus, the early common law rule against body executions in civil cases was held to be no longer applicable on the ground that it had never been in force in this country; the court therefore sustained the issuance of *alias ca.sa.* in civil cases (III, 454). An important source of revision and modification of the common law was the legislation of the seaboard states. The Ordinance of 1787 provided that laws adopted in the Northwest Territory "be not repugnant, but as conformable as may be to those of the original States, or of some one or more of them." The courts interpreted this provision, which paralleled the restriction in the colonial charters that no laws be made repugnant to the laws of England, as permitting the adoption of laws from different states, and such was the common practice in both the Indiana and Michigan Territories.

As regards equity, the Territory in the first period did not set up courts parallel to the English model, but followed such states as Massachusetts, where equitable remedies were dispensed in the courts of common law in common law actions and largely through common law forms. In 1819 equity matters and causes of divorce and alimony were placed on a separate docket. This separation was done to resolve doubts which had arisen as to the existence of a chancery jurisdiction. A challenge of such authority would have undermined titles to many valuable tracts of land affected by chancery decrees. Indiana Territory had already set up a separate chancery court.

Professor Blume has done an exemplary job of inventorying, collating and editing the papers and journal of the court and of Justices Woodward and Sibley. The index might serve as a model for other legal records and publications. There are arid stretches in these volumes that make one question at times whether publication of the record of this court might not have been reduced considerably in bulk without loss of vital material. Certainly this is true of the calendar. I can see no gain in publishing portions of records which were clearly indicated in the original as sections to be deleted. To do so smacks of pedantry, and is certainly not reproducing the intent of the writer, which, after all, should be the first aim of an editor. Volumes III and IV, for the purpose of indexing, have also been numbered as I and II. This causes some confusion. However, these are small details which should not detract from a proper appreciation of a large-scale enterprise whose value has been abundantly demonstrated in the four volumes thus far published.

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